BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

SEIU LOCAL 284, SCHOOL SERVICE EMPLOYEES

and

INDEPENDENT SCHOOL DISTRICT #726
Becker, Minnesota

BMS Case No. 06-PA-12

Appearances:

Mr. Keith Niemi, Esq., Union Representative, SEIU Local 284, 450 Southview Boulevard, South St. Paul, Minnesota 55075, appearing on behalf of the Union.

Littler Mendelson, Attorneys at Law, by Mr. J. Dennis O'Brien, 33 South Sixth Street, Suite 3110, Minneapolis, Minnesota 55402-3716, appearing on behalf of the Employer.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, SEIU Local 284, School Service Employees, hereinafter referred to as the Union, and Independent School District #726, Becker, Minnesota, hereinafter referred to as the Board or District, the undersigned was selected to serve as arbitrator of BMS Case No. 06-PA-12. Hearing was held on November 16, 2005, in Becker, Minnesota, at which time the parties presented such testimony, exhibits and other evidence as was relevant to the dispute. The parties filed post-hearing briefs by December 21, 2005, at which time the record was closed.

Now, having considered the evidence, the arguments of the parties, the contract language and the record as a whole, the undersigned makes the following Award.

ISSUES:

The parties were unable to stipulate to the issues to be presented. They agreed to have the Arbitrator frame the issues. The Arbitrator frames the issues as follows:

1. Is the grievance of Jason Roisland, the grievant, time barred?

2. Is the Vacancies Addendum that is attached to the parties' 2004-2007 collective bargaining agreement arbitrable?

3. What is the meaning of the language "Senior most qualified" used to fill vacancies under the Vacancies Addendum?

4. Based on that meaning, was the grievant improperly denied the March 18, 2005 posted position of "District Groundskeeper"?

5. If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS:

ARTICLE IV

SCHOOL DISTRICT RIGHTS

Section 1. Inherent Managerial Rights. The Exclusive Representative recognizes that the School District is not required to meet and negotiate on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion or policy as the functions and programs of the School District, its overall budget, utilization of technology, the organizational structure and selection and direction and number of personnel.

. . .

ADDENDUM

VACANCIES

New positions or vacancies of more than thirty (30) days duration will be posted for a period of five (5) working days. The senior most qualified applicant within the bargaining unit will be assigned thereto within five (5) days after the close of posting. Applicants for posted positions must submit their bid to the proper office in writing. Duplicate copies of all bids will be delivered to the steward of the unit by the District at the close of the posting. Successful applicants shall be placed on

> the next higher pay rate nearest their old pay rate. The position of secretary to the building principal is exempt from this addendum. The Building Principal's Secretary position is exempt from the Seniority Addendum. Once the vacancy is posted an interview committee shall be formed to interview candidates for said vacancy. Said committee shall include, but not be limited to, the union steward of the exclusive representative and one secretarial member selected by the bargaining unit. All bargaining unit members that apply for said vacancy shall be interviewed for said position prior to any outside candidates. They shall serve as active members of the interview committee and participate in making a recommendation to the building principal who shall make the final hiring decision recommendation to the board of education.

FACTS:

Independent School District #726, Becker, Minnesota, and School Service Employees Local 284, AFL-CIO, SEIU, have been parties to collective bargaining agreements dating back to at least the 1980-1982 school year.

In the July 1, 1982 - June 30, 1984 agreement, the parties first negotiated language on how new positions and vacancies would be filled. The language was not in the text of the agreement, but was on an added page to the document and appeared as follows:

> Add New Section – Vacancies – New positions or vacancies of more than 30 days duration will be posted for a period of 5 working days. The senior most qualified applicant within the posted vacancy classification will be assigned thereto within 5 days after the close of posting. Applicants for posted positions must submit their bid to the proper office in writing. Duplicate copies of all bids will be delivered to the steward of the unit by the district at the close of the posting.

At the top of the language was the following handwritten note:

> The following section shall be considered a part of the Agreement between I.S.D. #726 and School Service Employees, Local 284.

It is not clear who wrote the notation. Robert Larson, now retired Union Representative of Local 284 who negotiated the language on behalf of the Union, testified that the Board saw

and was aware of the notation. He also testified that the parties' intent of the language "senior most qualified" was that the most senior qualified employee would be entitled to and selected for the posted position. If two or more qualified applicants had the same seniority date, then the most qualified would be selected. Larson testified that common hire dates are not uncommon because sometimes employees are hired for the upcoming school year.

In the following collective bargaining agreement, July 1, 1986 through June 30, 1988, the vacancies language appeared in the back with the heading "ADDENDUM." Also, "Shifts" was added to the language that already covered "new positions" and "vacancies of more than thirty (30) days duration." The language remained unchanged until the July 1, 2004 through June 30, 2007 agreement. During this time, from July 1, 1982 through June 30, 2002, positions filled under the vacancies language were by straight seniority of the qualified employees. The process was simple. The vacancy was posted; interested employees would write a note or letter stating their interest; and the most senior was selected. [1] There was no interview or meeting held with the applicants.

District #726 has been unique over the years because a power plant located in Becker has essentially paid the way for the District for many years. There were few budget problems. That changed in 2003 because legislation redirected power plant money to the State. In 2003, the District was back fully on the State formula.

It was about this time the current Superintendent, Steven Dooley, was hired. He was faced with the new reality of running a District with budget woes. 2003 was the first year the District has had an unbalanced budget since the power plant has been in existence.

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[1] This was established through testimony of witnesses Cindy Agnew, Robert Larson, Debra Dee Lannoyi, George Lemperes, Lisa Sheman and Jason Roisland. Agnew testified that there were between 5 and 8 postings a years.

It was with this financial reality that the parties entered the 2004 negotiations. The negotiations were contentious. In addition to money issues involving wages and insurance, the vacancies language was a big issue. The District proposed eliminating it altogether. In the process of negotiations, the Superintendent was asked why he was so adamant in getting rid of the vacancies language. He stated that it was bad policy. He and the Board did not believe that filling vacancies should be a matter of entitlement. The issue was settled at the very last negotiations meeting. The District had expressed a concern, and an example of why they wanted the language eliminated; it objected to the principal's secretaries being subject to the language. At the end, the Union agreed that the principal's secretaries would be excluded. It was at this time, at the very end, that the Union stated that the Addendum should be in the text of the contract. The Superintendent testified that the Board indicated that they would walk out if that was the case. The parties settled by exempting the principal's secretaries and keeping the provision as an Addendum as it always was. The Union asked the Superintendent why he was so against the Addendum and he responded that it was "bad policy." Cindy Agnew, who was on the Union's bargaining team, testified that when agreement was reached, she asked if they recognized that the Addendum was part of the agreement, and the Superintendent and Board Member Klepen answered "yes."

When the position in dispute became vacant, Superintendent Dooley decided to utilize a new process to fill the vacancy. The vacant position was posted. The applicants were interviewed by a committee composed of the Superintendent, Chuck Stanger, Director of Buildings and Grounds, and Dave Lund. The applicants were interviewed individually and all were asked the same series of questions in the same order. At the conclusion of the interviews,

each committee member, separately, graded the applicants to determine the most qualified candidate. In addition to the questions, they considered attendance records and other "intangibles."

The parties stipulated to the following facts regarding the filling of the disputed position.

FACTS

1. Grievant Jason Roisland ("the Grievant") is employed by Independent School District No. 726 Becker ("the District"). He began working for the District on September 16, 1994.

2. Dave Braun is employed by Independent School District No. 726 Becker ("the District"). He began working for the District on December 27, 1994.

3. The terms and conditions of Building/Grounds, Custodial/Maintenance, Cooks, Secretaries, Paraprofessionals and Principal Secretaries employed by the District are governed by a Collective Bargaining Agreement ("CBA") that is negotiated between the School Services Employees, SEIU Local 284 and the District. The CBA is negotiated pursuant to the Minnesota Public Employment Labor Relations Act ("PELRA"), Minn. Stat. Ch. 179A.

4. On March 18, 2005, the District posted the position of *"District Groundskeeper."*

5. On April 12, 2005 the District assigned the position of *"District Groundskeeper"* to Dave Braun.

6. On April 13, 2005, the Union filed a grievance on the Grievant's behalf, the Union moved the grievance, to Levels I, II and III.

7. On June 23, 2005 the District issues its Step III denial of the grievance. This arbitration followed.

All agree that at the Level II meeting which was attended by the Superintendent, Agnew and Keith Niemi, SEIU attorney, the Superintendent took the position that he was going to deny the grievance and that the parties looked at the calendar to determine when the next school board meeting was so that the Union could appeal to the next step. They determined that date to be

June 6. The Superintendent understood, and fully expected, that the Union intended to appeal his decision to Level III (appeal to the School Board.)

On May 24, Superintendent Dooley sent a letter to Niemi, with copy to Agnew, recapping their Level II meeting in which the grievance was denied. He concluded the latter as follows:

> Since you indicated that you were prepared to appeal my decision to the Board of Education and suggested June 6th as an appeal date, we are hereby setting that appeal for June 6th. The appeal will be heard in open session at the end of the board meeting with the approximate time to be 7:00 p.m. – 7:30 p.m.

Subsequently after the day had passed, the Superintendent e-mailed Agnew stating that he appreciated the fact that they had decided to drop the grievance and not appeal to Level III.

By letter dated June 6, Niemi responded as follows:

> I am in receipt of the districts (sic) letter dated May 24, 2005 in which the district denied Jason Roisland's grievance at ~~the~~ Level II of the grievance procedure.
>
> The union hereby appeals your decision to the School Board at Level III, under the provisions of the Collective Bargaining Agreement.

The Union appeared at the June 6 Board meeting to appeal its grievance to the third step. The Board caucused and agreed to let the Union present its case and extend the timeline so that they would answer at the next Board meeting, June 23.

On June 7, Niemi sent the following letter to Bryan Olsen, School Board Chair:

> The union hereby appeals the Level II decision of the District to the School Board at Level III of the grievance procedure.
>
> This letter is to confirm our understanding reached last night at the School Board Meeting, where both the district and the union mutually agree to extend the

timeline for the aforementioned grievance as they relate to the appeal from Level II to Level III.

Now that School Board has had an opportunity to hear the grievance at Level III, I am hopeful that the board will weigh all the facts and come to a decision that upholds the contract.
(Joint Exhibit 7)

On June 23, the Board responds as follows by letter to Niemi:

This is to inform you that the board of education, at a special meeting on Thursday, June 23, 2005, voted to deny the appeal of the vacancy addendum grievance.

The board felt that the contract was followed specific to the language of "senior most qualified" and it was the right of management to make the "most qualified" determination. They felt the interview process and that the independent scoring of the candidate responses were done well and served to help determine most qualified. It should also be noted that I informed the board that two separate attorneys concluded that because the grievant would not experience a pay increase or change of hours the board's position, relative to potential arbitration, was strengthened.

The School Board, as you requested, heard the grievance at Level III and has weighed all the facts. Furthermore, they have sought two legal opinions. They feel their decision is in the best interest of the school district and that it upholds the specific wording of the negotiated agreement. Their hope is that Local #284 will now accept that the determination of "senior most qualified," language that was mutually agreed to in negotiating the current Master Agreement, is a managerial right and that we can now put this matter to rest. The board is anxious to move forward and hopes that the local and the district can work cooperatively in resolving any and all contract issues that arise. To pursue this any further, at great expense to the district and the local, when the grievant does not benefit by a promotion or additional pay, is not in the best interest of the students or the employees of District #726.

POSITIONS OF THE PARTIES:

It is the Employer's position that the dispute in issue is not arbitrable because (1) the parties narrowly defined grievance to the interpretation or application of terms and conditions

contained in "this agreement" and (2) the Union's grievance concerns the District's exercise of inherent managerial policy.

As to the former, the Employer argues that the Vacancies Addendum is clearly collateral to, rather than a part of, the agreement and therefore not subject to the agreement's grievance procedure. Further, the Employer argues, when the parties intended to incorporate documents outside the four corners of the agreement into the agreement they knew how to do so and did so (example, incorporating wages and salaries reflected in Appendix A). Here, they did not do so.

With respect to its second procedural argument, the Employer contends that the Arbitrator's jurisdiction does not extend to matters of inherent managerial policy and that the agreement expressly includes the selection of personnel as a matter of inherent managerial policy.

The Union asserts that clearly the Addendum is part of the contract and subject to the grievance procedure because (1) the parties by their actions for the past 21 years show that they understood the Addendum to be part of the collective bargaining agreement, (2) the District in denying the instant grievance at Level II and III states "negotiated language of the contract" in referencing the Addendum, and (3) the District believed the Addendum to be part of the contract, otherwise it would not have sent the Union a letter prior to the most recent negotiations indicating its intention to bargain the Addendum out of the contract.

Indeed, it is argued, the District understood that the Addendum was part of the contract and that is why it bargained so hard to remove it. When it could not get it removed, the District agreed to leave it in the contract with the addition of the language that excluded Principal Secretaries from its provisions.

The Union's position with respect to merits of the dispute is that basis of the instant process is very simple and is substantiated by a long history of past practice. As testified to by the six Union witnesses, "Senior most-qualified" has always meant, from the time it was made part of the contract in 1982 to the present, that the senior candidate bidding on a position shall be awarded that position at the close of the posting. If the scenario were to occur, that two employees with the same seniority date bid on a posting, the District would then determine "most-qualified" and that candidate would be awarded the position. Both parties by their actions over 21+ years of practice support this interpretation of the language. It is argued that if the Employer were permitted to bypass this negotiated language when it feels an employee is not a good fit in the position, the result would be that employees are subject to the whims of the boss without benefit of their hard fought rights under the collective bargaining agreement.

The Union argues that the Employer retains those managerial rights not bargained and modified in the collective bargaining agreement. In this collective bargaining agreement, those rights have been modified. The modifications remain in force notwithstanding the District's desire to create new procedures for posting positions. Just because the District says through its superintendent that the language of the Addendum does not say what it says, does not change the fact the District is bound by that language it agreed to in the collective bargaining agreement.

The District certainly does retain the right to assign employees tasks to do within the scope of their positions and to direct those employees' work. PELRA gives the Employer the right, in the absence of other negotiated language, to determine "selection of personnel, and direction and the number of personnel." Minn. Stat. §179A.07, subd. 1. In this case, selection of personnel occurs through the function of the posting process contained in the Addendum. This

Addendum applies to applicants who are part of the bargaining unit. It does not have an impact on new applicants to the District who are not yet part of the bargaining unit.

While it may be true that Superintendent Dooley has been directed by the school board to change hiring practices, this direction does not give the superintendent the "inherent managerial right" to re-define contract language or alter the interpretation of contract language to suit his needs. Rather, modification of contract language occurs when the parties reach a mutual agreement through the collective bargaining process. Contract language should not be modified outside the bargaining process by a decision of an arbitrator. There is no doubt that the District desires to place employees into positions it feels are appropriate. However, this desire is thwarted by the existence of the 21 year old Addendum that protects employees from unfair supervisors and prevents favoritism in job assignments.

Based on the above, the Union asks the Arbitrator to sustain the instant grievance and make the grievant whole by awarding him the position of "District Groundskeeper."

It is the District's position that if the Arbitrator reaches the merits of the grievance, the Union bears the burden of proof to establish a contract violation. It has not done so.

The District argues that the operative language (the Addendum) could not be clearer. It is unambiguous and must be applied without going outside the language itself.

The Addendum plainly requires the District to consider more than just seniority when filling an open position. The Addendum identifies two criteria: seniority and comparative ("most") qualifications. As such, neither seniority nor qualifications operate alone; the two criteria function together in the selection process; the provision does not make either of these factors controlling and thus, neither is. For this reason, grievant cannot assert that his seniority

should prevail regardless of the relative qualifications between he and other applicants. The District claims it rightfully compared the qualifications and seniority of competing employees.

The Union's position that the grievant should have been selected by virtue of his being qualified for the job and for being the most senior applicant misstates the pertinent language. The Addendum provides "senior most qualified." Grievant would like to read "most senior, qualified," but that is not what the parties negotiated. These two phrases produce entirely distinct concepts and cannot be interpreted to mean the same thing or require the same analysis by the District. "Most senior qualified" suggests that, so long as an employee meets the qualifications for a position, that employee is entitled to the position if he is more senior than other competing candidates. That phrase does not require a comparative analysis of employee qualifications. Rather, the selection process would require only a determination of whether each candidate meets the essential qualifications, and the comparative analysis would be limited to the candidates' seniority. However, the parties simply did not agree to the language "most senior qualified." Here, the word "most" modifies the phrase "qualified applicant" rather than "senior." Thus, the comparative analysis between applicants necessarily takes place in the context of the candidates' qualifications.

The District argues that the Union's mischaracterization of the phase "senior most qualified" to instead read "most senior qualified" creates a relationship between those terms that simply cannot be maintained. If the Arbitrator were to adopt the Union's confusion of "senior most qualified" to mean simply "most senior," the phrase "most qualified" would be meaningless. The Union's interpretation is unsupported by the most straightforward of readings, and should be rejected out of hand as contrary to long-standing maxims of contract interpretation.

The District contends that its interpretation should be used because it gives effect to both seniority and the comparative qualification analysis. Under the District's sensible interpretation, each applicant is evaluated in every case based on his or her comparative qualifications. If one candidate is determined "most qualified" as compared to the other candidates, that candidate receives the offer. However, if, after evaluating the comparative qualifications, two or more candidates receive essentially similar scores such that no one candidate can be considered "most qualified," then seniority acts as a tiebreaker.

The language that the parties agreed to is quite similar in its import to the commonly used "relative ability clause" that provides in essence that the senior employee shall be given preference if he or she possesses fitness and ability equal to that of junior employees. Under this class of seniority clauses, comparisons between qualifications of employees bidding for a job are necessary and proper, and seniority becomes a determining factor only if the qualifications of the bidders are equal.

Because this interpretation gives effect to the entire provision "senior most qualified," it is plainly the more preferable interpretation.

With respect to the Union's attempt to establish a past practice and thereby bind the District through the testimony of Union employees who claim to have been selected based solely on seniority fails for several reasons.

It is the District's position that the Union has not establish that the parties' past practice is an unequivocal, clearly enunciated and acted upon or one accepted by both parties. The District argues that none of the Union employees who testified that they were selected to fill a job opening were able to testify that they were not also the most qualified for the position. Thus, there is no record evidence of a valid past practice as alleged by the Union.

Further, the District argues that contractual language can preclude a party from relying on past practice. Here, the parties negotiated a broad zipper clause into Article XVII of the agreement that eliminated past practices and affirmed the District's broad management rights. Said zipper clause clearly supersedes any past practice between the parties.

Lastly, it is argued that during negotiations of the current contract, the District notified the Union of its intent to discontinue the prior practice surrounding selection of candidates for job vacancies. Thus, the practice must be determined to be discontinued.

It is the District's position that the District properly followed the vacancy language in filling the position in dispute and that pursuant to its selection process which was fair and non-discriminatory the most qualified applicant was selected. The grievant although more senior was not the most qualified for the position of District Groundskeeper.

Based on the above, the District urges the Arbitrator to find in its favor and dismiss the instant grievance in its entirety.

DISCUSSION:

Arbitrability Issue

The critical language in issue regarding "vacancies" is not contained in the text of the parties' collective bargaining agreement, but rather is an Addendum to the contract. Whether the Arbitrator has jurisdiction to even reach the merits of the parties' dispute hinges on whether the Addendum is part of the collective bargaining agreement or not. This is so because the Arbitrator's jurisdiction, pursuant to the terms of the contract, is limited to "disputes or disagreements relating to grievances properly before the Arbitrator . . ." and not "to matters of inherent managerial policy, which shall included (sic) but are not limited to such areas of discretion or policy as the function and programs of the School District . . . and direction and

number of personnel." (Article XII, Section 8). A grievance is defined as "an allegation by an employee resulting in a dispute or disagreement between the employer and the School District as to the interpretation or application of terms and conditions contained in this Agreement." (Article XII, Section 1).

The issue narrowly defined is whether the Vacancies Addendum is part of "this agreement."

In the opinion of the Arbitrator, an Addendum to a collective bargaining agreement by definition becomes part of the agreement. Black's Law Dictionary[2] defines "addendum" as follows: Something to be added esp. to a document; a supplement.

Webster's[3] defines addendum as "a thing that is added or is to be added."

Not only did the parties refer to the vacancies provision as an addendum, they also specifically described what they were doing, when they first incorporated the provision, as: "Add New Section – Vacancies". By agreeing to add a new section, it is quite clear they intended the provision to be part of the agreement. For reasons discussed later in the discussion, there is no reason to believe that the parties' intent changed in the ensuing years.

Merits

The language in dispute and the crux of the case is the definition of the selection criterion as contained in and agreed to by the parties in their Vacancies Addendum. The vacancies provision provides that the "senior most qualified" applicant will be assigned to the posted position.

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[2] Eight edition

[3] Third New International Dictionary, unabridged, 1993.

The District claims that the disputed language requires that both seniority and comparative qualifications be considered and if two or more applicants are equally qualified (neither is most qualified), then seniority is the alternative factor. What's more, and importantly, the District claims that the disputed language is so clear and unambiguous as to its meaning and intent that it must be applied by the Arbitrator without going outside the written agreement to determine the intent of the parties.

The District, of course, is correct in its analysis of arbitral law, i.e., that clear and unambiguous language must be applied because the best evidence of the parties' intent is the language they themselves used. The Arbitrator, however, contrary to the District, does not find the disputed vacancies language sufficiently clear and unambiguous to preclude the use of extrinsic evidence for the purpose of determining the parties' intent. This is so because regardless of which party's interpretation of the language, the language is still unclear. Both parties try to give all of the words "senior most qualified" meaning. The Union's interpretation is troublesome because the most senior qualified applicant is entitled to the job and the "most qualified" factor only comes into play when applicants have the same seniority date. On the other hand, under the District's interpretation "seniority" only becomes a factor if competing applicants are "most qualified." But it would be a rare situation where more than one applicant would be determined to be "most qualified" as opposed to "qualified" or a "relatively equal" standard. The "most qualified" standard is not one that anticipates only one qualifier; the "most" qualified of those that are qualified. The "most qualified" component of the "senior most qualified" criterion would result in "seniority," at least in almost all cases, to be a non-factor. In the final analysis, the language itself, standing alone, is ambiguous as to its meaning and the parties' real intent.

Under the circumstances, not only is it permissible but it is necessary to consider the parties' past application of the selection criterion "senior most qualified" to determine the parties' intent of same.

The District, however, argues that past practice cannot be considered because (1) the parties' contractual zipper clause precludes same and (2) even if there is a past practice, the District in the last negotiations provided notice to the Union that it intended to discontinue the practice.

The zipper clause excludes past practices, but here what is being considered and applied is an Addendum which earlier has been determined to be part of the parties' collective bargaining agreement. The parties' practice in applying the Addendum establishes the parties' intent of same. It gives meaning to an ambiguous term of the Addendum. What's being applied is the Addendum as defined by the parties. This is not a case where the parties are filling vacancies based purely on a practice without reference to a written agreement on vacancies. Here, the practice gives meaning to the Addendum which is part of the agreement.[4]

With respect to the parties' bargaining history of their 2004 negotiations, the parties agree that the Vacancies Addendum was placed in issue by the District. It proposed to delete the Addendum altogether. The District's real concern was that the Addendum applied to the Principal's secretaries which the District thought should be excluded. The parties compromised by retaining the Addendum but exempting the positions of secretary to the building principal from the Addendum. Significantly, the discussion did not center around continuing or discontinuing the past application of the Addendum, but only if it should be continued. There

[4] See Elkouri and Eklouri, "…zipper clauses do not negate practices that are relied on for the purpose of casting light on ambiguous contract language" (footnotes omitted). P. 621, 6th edition.

was no discussion of the selection method itself, only whether the Principals' secretaries should be excluded. At the very end of negotiations the issue of whether the Addendum should be put in the text of the agreement was first discussed. At this point, Superintendent Dooley stated he did not think it should because it was bad policy.[5] This however does not constitute a repudiation of its meaning or application. In the final analysis, the parties agreed to continue the agreed-upon Vacancies Addendum, as modified. As such, the vacancies provision retained its status as an Addendum. It therefore, for reasons discussed earlier, is part of the agreement as an add on.

Based on the above, the Arbitrator finds it appropriate to consider the parties' past practice of applying the disputed Addendum. Six witnesses, all offered by the Union, testified regarding the past use and application of the Vacancies Addendum and one, Robert Larson, testified as to the bargaining history of the provision.

Larson testified that the parties' intent of "senior most qualified" was that among qualified applicants for a vacant position, the most senior would be selected. If there were multiple applicants with the same seniority, then the most qualified would be awarded the position. He recalled that one of the previous superintendents during his (Larson) tenure asked him what happens if there was a tie in seniority. He responded that he then could select the most qualified.

The testimony of the five other witnesses, all employees, establishes that there was an average of six to eight postings a year since the inception of the Vacancies Addendum in 1982; that it was commonly understood among the employees that the most senior qualified applicant

[5] Superintendent Dooley was recently hired and unlike his predecessors was confronted with serious budget issues. His move to change the vacancies selection process was a good faith effort that, in his judgment, would improve the efficiency of the District's operation.

was entitled to the posted position; and that in fact all selections in the last 21 years were made on said basis. There is no evidence that any selections were made on the basis of most qualified first and then by seniority if needed. The District argues that there is no evidence that the five witnesses who testified that they were selected and were the most senior were not also the most qualified for the position. However, Agnew testified that in her 2001 bid she was told she was getting the position because she was the most qualified; that Lemperes who bid four times previously was told at the time he was informed of his selection on his last bid that he was the most senior; and that Lannoyi testified that she bid twice before and on her last was selected based on her seniority.

Also, Superintendent Dooley testified that the reason the District and he, in the 2004 negotiations, wanted to delete the vacancies provision altogether was because it was "bad policy". The bad policy referred to was the filling of vacancies on the basis of seniority. They did no believe that employees were "entitled" to positions just based on seniority.

Further, the language used by the parties in their first incorporation of the vacancies provision in 1982, is consistent with their ensuing practice in applying the provision and confirms the parties' intent. The parties agreed to: "Add New Section – Vacancies". Clearly, the parties intended and considered the new vacancies provision to be part of the contract. In subsequent years the parties simply referred to the provision as an "Addendum". There is no evidence in the record of the bargaining history of the change. In the opinion of the Arbitrator, the most reasonable interpretation of the change is that in subsequent agreements the provision "Add New Section" was deleted and it was referred to as an "Addendum", (which means the

same, i. e., an "addition"), because the provision was no longer new. The Arbitrator does not interpret the change as a decision by the parties to exclude the provision from the contract.

Based on the evidence presented, it is abundantly clear to the Arbitrator that the parties by their application of the Vacancies Addendum since its inception intended the selection criterion of "senior most qualified" to mean that the senior qualified applicant posting for a vacant position would be assigned the position and that in cases where the seniority of applicants were the same, the most qualified applicant would be selected.

The grievant was the most senior applicant for the District Groundskeeper position and was qualified.[6]

Based on the above facts and discussion thereon, the Arbitrator renders the following

AWARD

1. That the grievance of Jason Roisland, the grievant, is not time-barred. [7]

2. That the Vacancy Addendum attached to the parties' 2004-2007 collective bargaining agreement is arbitrable.

3. That the meaning of the language "senior most qualified" used to fill vacancies under the Vacancy Addendum is that the applicant selected shall be the senior qualified applicant and that if there are applicants with the same seniority then the most qualified is selected.

4. Based on said meaning of the language, the grievant was improperly denied the March 15, 2005 posted position of "District Groundskeeper."

[6] The District does dispute that the grievant was qualified, just that he was not the most qualified.

[7] The District dropped its objection on this ground.

5. That the grievant shall be made whole by assigning him to the "District Groundskeeper" position and making him whole for all lost wages and benefits, if any.

6. That the Arbitrator retains jurisdiction for a period of forty-five (45) days from the date below to resolve any issue(s) that may arise in the implementation of the remedy awarded.

Dated at Madison, Wisconsin, this 13th day of February 2006.

Herman Torosian, Arbitrator